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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEVYN JOHNSON, Defendant and Appellant.	B287064 (Los Angeles County Super. Ct. No. BA455556)

APPEAL from a judgment of the Superior Court of Los Angeles County, William N. Sterling, Judge. Affirmed.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Kevyn Johnson (Johnson) guilty of attempted murder and of shooting at an occupied vehicle, with gun and gang enhancements. On appeal, Johnson contends that the trial court prejudicially erred by refusing to instruct the jury on imperfect self-defense. We reject that contention and affirm the judgment.

BACKGROUND

I. The shootings

On March 15, 2018, Clayneisha Penn was in a car with three men, including her boyfriend Hakeem Smith.[1] Smith, a Pueblo Bishops gang member, was driving. They were near a high school in Rollin' 40's gang territory when 11 to 12 gunshots rang out. Smith was shot in the arm. Penn was unaware of what may have instigated the shooting. Nobody in her car said anything to anyone outside of the car, and Penn did not hear anything said to them.

An off-duty detective who happened to witness the shooting saw the shooter leaning out of the front passenger window of a red car. The detective followed the car until responding officers arrived. Officer Robert Smith then followed the suspects' car and ultimately detained its occupants: Keilon Cook, the driver, and Johnson, the front passenger. Both are Rollin' 40's gang members.

Cook's car had no damage consistent with being struck by bullets. Officers recovered a nine-millimeter gun and ammunition from the car. They also recovered 11 nine-millimeter casings from the scene of the shooting.

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[1] Penn claimed not to know the names of the other men in her car.

II. Procedural background

Johnson was charged with four counts of attempted murder (Pen. Code,[2] §§ 664, 187, subd. (a); counts 1–4) and one count of shooting at an occupied vehicle (§ 246; count 5) with gun and gang enhancements alleged as to all counts. A jury found Johnson guilty of the attempted murder of Smith and of shooting at an occupied vehicle.[3] As to both counts, the jury found true gun (§ 12022.53, subds. (b), (c)) and gang (§ 186.22, subd. (b)(1)(C)) allegations.

On December 8, 2017, the trial court sentenced Johnson to the high term of nine years in state prison for the attempted murder, plus a consecutive term of 20 years (§ 12022.53, subd. (c)), and another consecutive term of 10 years (§ 186.22, subd. (b)(1)(C)).[4] The trial court imposed a $5,000 restitution fine, a $60 court facilities assessment, an $80 court operations assessment, and a $5,000 parole revocation restitution fine, stayed.

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] The jury acquitted Johnson of the other three counts of attempted murder and found a firearm enhancement under section 12022.53, subdivision (d), not true.

[4] The trial court imposed but stayed sentences on the remaining count and enhancements.

DISCUSSION

The trial court denied the defense's request to instruct the jury on the theory of imperfect self-defense.[5] Johnson now contends that the trial court erred. We disagree.

A trial court must instruct the jury on all general principles of law relevant to the issues raised by the evidence, including lesser included offenses, and defenses on which the defendant relies and that are not inconsistent with his theory of the case. (*People v. Moye* (2009) 47 Cal.4th 537, 548.) Instruction on a lesser included offense is required when there is evidence the defendant is guilty of the lesser offense but not the greater. (*People v. Whalen* (2013) 56 Cal.4th 1, 68.) Substantial evidence is evidence that a reasonable jury could find persuasive. (*People v. Benavides* (2005) 35 Cal.4th 69, 102.) However, the existence of any evidence, no matter how weak, will not justify instructions on a defense or a lesser included offense. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) We independently review whether the trial court erred by failing to instruct on a lesser included offense or a defense. (*People v. Simon* (2016) 1 Cal.5th 98, 133.)

Self-defense is of two types: perfect and imperfect. (*People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1168.) Perfect self-defense requires a defendant have an honest and reasonable belief in the need to defend himself or another. (*Ibid.*) Imperfect self-defense is the killing of another person under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury. (*People v. Booker* (2011) 51 Cal.4th

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[5] Imperfect self-defense does not apply to shooting at an occupied vehicle, count 5. (*People v. Iraheta* (2014) 227 Cal.App.4th 611.)

141, 182.) " 'Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice. The defendant's fear must be of *imminent* danger to life or great bodily injury.' " (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) Imminence refers to the defendant's perception of a harm that he must deal with immediately. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) Imperfect self-defense reduces murder to manslaughter by negating the element of malice. (*Ibid.*) Thus, imperfect self-defense is not a true defense but rather a form of voluntary manslaughter. (*People v. Barton* (1995) 12 Cal.4th 186, 200–201.)

Here, Johnson's argument that the trial court should have instructed the jury on imperfect self-defense rests on Officer Smith's vague reference to hearsay information that suggested Penn and her companions were on a coordinated mission to assault rival Rollin' 40's gang members. Further, Penn testified that when they were near the school the occupants of her car commented that "stuff happens" there, so they rolled down the windows to let "them . . . know that there's nothing going on." The People's gang expert also discussed gang rivalry, missions, and that when gang members travel through a rival's territory the gang members are usually armed.

From this evidence, Johnson speculates that Penn and her companions were indeed on a mission to assault Rollin' 40's gang members and, by their presence, provoked the shooting. However, this conclusion does not follow from the evidence. As the trial court said, even if we assumed Penn and her companions were "looking for trouble" there is no evidence that someone in Penn's car did something to provoke an attack or, more importantly, that Johnson felt he was under any imminent threat

of death or great bodily injury. In *People v. Manriquez* (2005) 37 Cal.4th 547, 582, for example, the defendant based his request for an imperfect self-defense instruction on evidence that he had heard that the victim wanted to kill him. At most, this amounted to fear of future harm and did not evidence an *imminent* threat. Similarly, here, even assuming Penn and her companions went into rival Rollin' 40's territory on a mission, there is no evidence they did anything to provoke Johnson or that Johnson perceived them to be an imminent threat to his safety. (See *People v. Simon*, *supra*, 1 Cal.5th at p. 133 [no evidence defendant perceived risk of imminent peril].) The victims' mere status as rival gang members in rival gang territory is not enough to show that Johnson had an actual belief of imminent harm.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

EDMON, P. J.

EGERTON, J.